Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF MILITARY HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The following scholars are experts in the field of military history, each of whom has devoted significant attention to studying the United States military and related subjects. By virtue of their expertise in military history, they are also familiar with the history of conscientious objector laws in the United States:

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court struck a balance, holding that the religious accommodation contained in the Affordable Care Act's regulations provides the key to reconciling the rights of employers, employees, and the government. As described by the Court, the accommodation is "an alternative that achieves all of the Government's aims while providing greater respect for religious liberty" and ensuring that "women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2759, 2760; *id.* at 2786 (Kennedy, J., concurring) ("Th[e] accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs."). In these consolidated cases, petitioners contend that the religious accommodation hailed in *Hobby Lobby* violates their rights under the Religious Freedom Restoration Act ("RFRA"). Even though the accommodation eliminates any role for the employer in the provision of contraceptive services and shifts the burden of paying for contraceptive coverage to insurance companies or to the government, petitioners nonetheless insist that it is unlawful because, in their view, the government may not require them to fill out a simple form or even notify the government that they qualify for the accommodation. This is wrong.

The government has demonstrated that petitioners' argument rests on an untenable interpretation of RFRA and this Court's decision in *Hobby Lobby*. *See* Resp'ts' Br. at 30-34, 41-53, 72-85. *Amici* submit this brief to demonstrate that petitioners' claim is profoundly inconsistent with how religious accommodation has long been understood in this country, as evidenced by the history of conscientious objector laws

enacted over the entire sweep of our nation's history. Here, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Accommodations of the sort contained in the Affordable Care Act's regulations—which allow religious objectors to opt out while third parties fulfill their obligations—represent a longstanding method of ensuring religious liberty, while also protecting the rights of third parties and furthering important governmental purposes. Indeed, for the entire sweep of our nation's history, this has been a common feature of conscientious objector laws applicable to military service.

The Founding generation that wrote the constitutional guarantee of free exercise of religion was familiar with conscientious objector laws that allowed individuals with a religious objection to war to refuse to participate in combat, while also requiring them to pay money to furnish a substitute. Numerous Revolutionary-era state constitutions and laws contained religious accommodations that required a religious objector to pay money to furnish an equivalent in order to aid in defense of the nation. This balance reflected, in the words of one prominent and influential Pennsylvania minister, that "[a]ll . . . should have a free use of their religion, but so as not on that score to burden or oppress others." *See* Rev. Francis Alison, Love of Country (Jan. 1756), *quoted in* J. William Frost, *A Perfect Freedom: Religious Liberty in Pennsylvania* 51 (1990).

Religious exemptions for military service requiring a conscientious objector to pay for a substitute to serve in his stead figured prominently in debates over the Bill of Rights. Discussion in Congress over efforts to include a religious exemption in the Second

Amendment and the First Militia Act stressed the need to ensure that conscientious objectors did their part to ensure the safety of the nation. For example, during the debates over the Second Amendment, Rep. James Jackson argued that a religious exemption from combat would be "unjust, unless the constitution secured an equivalent." 1 Annals of Cong. 779 (1789). Ultimately, neither the Second Amendment nor the First Militia Act contained a religious exemption of any kind, leaving the matter to the states (which often required religious objectors to pay to provide a substitute).

Since the Civil War, federal draft laws have contained a religious accommodation for conscientious objectors, requiring them to provide some form of alternative service or pay a sum of money to support the nation. The current federal draft laws exempt those with a religious objection to war from "combatant training and service," requiring them to perform "noncombatant service" or "civilian work contributing to the maintenance of the national health, safety, or interest." 50 U.S.C. § 3806(j). Federal law, in certain respects, does not treat conscientious objectors who perform alternative service the same as those who fight on the battle field. For example, those who perform alternative service are not given the same benefits as those who perform actual military service. *See Johnson v. Robison*, 415 U.S. 361 (1974) (upholding federal statute denying veterans' educational benefits to religious objectors who performed alternative service during war).

What petitioners insist is a "textbook substantial burden on religious exercise," Pet'rs' Br. at 2 (Nos. 15-35, 15-105, 15-119, & 15-191); Pet'rs' Br. at 37 (Nos. 14-1418, 14-1453, & 14-505), is what history shows is a common practice—accommodating conscientious

objectors by shifting their obligations to third parties who do not share that objection. In fact, religious accommodations have often required religious objectors to play a far more active role in shifting that responsibility than does the accommodation here, for example requiring religious objectors opposed to war to pay for a substitute to serve or take some other action to satisfy the important interests of the government. Petitioners' sweeping definition of what constitutes a substantial burden on religious exercise cannot be squared with the history of conscientious objector laws.

Under petitioners' view of RFRA, courts would be obliged to apply the most searching form of judicial scrutiny known to constitutional law to a whole range of longstanding religious accommodations, including conscientious objector laws applicable to military service. Indeed, the implication of petitioners' arguments, as the D.C. Circuit observed, is the "'fantastic suggestion'" that "the Selective Service could deny a religious conscientious objector's RFRA claim against calling up the next draftee only if the government's decision to do so survived strict scrutiny." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 252 (D.C. Cir. 2014) (quoting *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014), *judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015)); *see also* Resp'ts' Br. at 48. This Court should decline petitioners' invitation to subject to strict scrutiny accommodations that permit religious actors to raise a religious objection, while other persons without such religious objection fulfill the religious objectors' legal obligations. Such accommodations protect religious liberty, rather than burden it, and similar accommodations have long

been used to secure religious liberty for conscientious objectors to war.

The Affordable Care Act's religious accommodation, like conscientious objector laws that span the entire course of our history, promotes religious liberty and respects the beliefs of religious objectors, without harming other essential interests—in this case, women's interest in full and equal health care coverage. RFRA does not stand in the way of such means of "providing greater respect for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2759.

ARGUMENT

I. CONSCIENTIOUS OBJECTOR LAWS AT THE TIME OF THE AMERCAN REVOLUTION AND THE FRAMING OF THE CONSTITUTION REQUIRED INDIVIDUALS OBJECTING TO PARTICIPATION IN MILITARY SERVICE TO PAY FOR A SUBSTITUTE.

Religious accommodations in this country have long promoted religious liberty by exempting religious objectors from legal requirements and transferring their obligations to third parties. The guarantee of the free exercise of religion has never been understood to annul these accommodations. "From the beginnings of our history, Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition . . . that they supply the Army with a substitute or with the money necessary to hire one." *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 266 (1934) (Cardozo, J., concurring). Religious accommodations that require a conscientious objector to pay money to furnish an equivalent to meet the needs of government and

protect the rights of third parties are as old as the nation itself.

A. Colonial Constitutions and Laws Frequently Required Religious Objectors To Pay To Furnish a Substitute.

During the American Revolution, numerous State Constitutions and other state laws required conscientious objectors to war to pay a sum of money to furnish a substitute. For example, the Pennsylvania Constitution of 1776 provided that "[n]or can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent." Pa. Const. of 1776, art. VIII. The Constitutions of Delaware, New Hampshire, New York, and Vermont all contained similar language. *See* Del. Declaration of Rights of 1776, § 10; N.H. Const. of 1784, pt. I, art. XIII; N.Y. Const. of 1777, art. XL; Vt. Const. of 1777, ch I, art. IX; *see generally* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1632-33 (1989) (collecting state constitutional provisions); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1456 (1990) (arguing that "[t]hese state constitutions provide the most direct evidence of the original understanding" of the meaning of free exercise of religion).

Other states had statutory provisions that freed conscientious objectors from having to engage in combat, empowering officials to locate "proper substitutes to serve in their stead" and to "adjust and divide the charge thereof among all the members of their respective [religious] societies." *See* Va. Act of October 20, 1777, *reprinted in* 2 pt. 14 *Backgrounds of Selective Service* 837, 845 (1947); Laws of N.C., 1777, ch. XV, § xx, *reprinted in* 24 *The State Records*

of North Carolina 117 (Walter Clark ed. 1905) (requiring Quakers and other religious objectors to pay a "Fine of Twenty Five Pounds . . . in Lieu of their personal Service on any Alarm or Expedition . . . to defray the Expences of the War"). On the local level, county committees issued similar orders, requiring that, in the words of one Maryland county's 1775 order, "every person who enjoys the benefit of their religion & protection of the Laws of this free County ought to Contribute either in money or Military service towards the defence of these invaluable rights." *See* Richard K. MacMaster et al., *Conscience in Crisis: Mennonites and other Peace Churches in America, 1739-1789*, at 224 (1979) (quoting *Proceedings of the Committee of Observation for Elizabeth Town District*, Md. Historical Mag., June 1917, at 144-45). The upshot of these constitutional and statutory provisions was, as Douglas Laycock has explained, that in "[m]ost colonies, and later most states, . . . Quakers and similar conscientious objectors were exempt from military service in person, but were required to provide a substitute, pay a commutation fee, or less commonly, perform alternative service." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1808 (2006).

These religious accommodations, and their insistence that conscientious objectors furnish an equivalent, grew out of debate over the meaning of religious freedom between Quakers, who argued—much like petitioners do here—for an unconditional religious exemption, and backers of the Revolution, who "were tolerant enough to guarantee a constitutional exemption from military service, but . . . sufficiently attached to equality under law to demand an equiva-

lent from those who were exempted . . . ." Phillip Hamburger, *Religious Freedom in Philadelphia*, 54 Emory L.J. 1603, 1606 (2005). These debates were particularly important in Pennsylvania, where Quakers and members of other peace churches made up a significant portion of the population and the colonial legislature had long refused to organize a militia. *See* Laycock, *supra*, at 1810-25; Hamburger, *supra*; Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & Religion 367, 383-94 (1994).

The issue came to a head in October 1775, during the Revolutionary War. The Pennsylvania House of Representatives received a number of petitions urging that conscientious objectors be required to pay to furnish an equivalent in order that "the Terms of Exemption may be adequate to the Dangers, Loss of Time and Expence incurred" by those of other religious beliefs. *See The Petition from the Committee of the City and Liberties of Philadelphia* (Oct. 20, 1775), *in* 8 *Pennsylvania Archives* 7311, 7312 (Charles F. Hoban ed., 8th ser. 1935). The petitions insisted on "an *equal* and *general* Contribution . . . from all Ranks of People," *see The Memorial of the Officers of the Military Association of the City and Liberties of Philadelphia* (Oct., 30, 1775), *in id.* at 7337, 7339, observing that "[w]e know of no Distinctions of *Sects*, when we meet our Fellow Citizen on Matters of public Concern, and ask those conscientiously scrupulous against bearing Arms, to contribute towards the Expence of our Opposition . . . because the general Defence of the Province demands it." *Id.* at 7338. A modest contribution, they argued, was in line with the principle that "the Safety of the People is the supreme Law;—that he who receives an equal Benefit, ought to bear an equal Burthen." *See The Petition*

and Remonstrance of the Committee of the City and Liberties of Philadelphia (Oct. 30, 1775), *in id.* at 7334, 7336. After all, "by paying a Fine for such Exemption," Quakers and others with a religious objection to combat were plainly "in a better Situation than one who risks his Life in the Service." *See The Memorial of the Officers of the Military Association, supra, in id.* at 7337, 7339.

The Quakers claimed that any demand to pay to furnish a substitute would "subvert that most essential of all Privileges, *Liberty of Conscience*." *See The Address of the People Called Quakers* (Oct. 27, 1775), *in id.* at 7326, 7327. Their demand for unconditional religious exemption—which struck many as imposing an unfair burden on those of other religious beliefs—did not carry the day. Pennsylvanians did not view the requirement that those exempt from combat should pay for a substitute as imposing a substantial burden on religious exercise. In a community composed of a "rich mosaic of religious faiths," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1849 (2014) (Kagan, J., dissenting), "'[a]ll . . . should have free use of their religion, but so as not on that score to burden or oppress others,'" *see* West, *supra*, at 389 n.97 (quoting Rev. Francis Alison, *Love of Country*).

In November 1775, the Pennsylvania Assembly issued a resolution ordering men between the ages of 16-50 to join the Military Association, requiring those "conscientiously scrupulous of bearing Arms" to "contribute an Equivalent to the Time spent by the Associators in acquiring . . . . military Discipline." 8 *Pennsylvania Archives*, *supra*, at 7351. "Ministers of the Gospel of all Denominations" were exempted entirely from the obligation to contribute. *Id.* Later in 1775, the Pennsylvania legislature imposed a tax on those refusing to join the state militia, reflecting that

"every member of the community had an obligation to contribute to the common cause and the additional tax would be a concession to those who could not meet that obligation on the field of battle." MacMaster et al., *supra*, at 222. Finally, in 1776, Pennsylvanians wrote into their new State Constitution the principle that conscientious objectors to war could lawfully refuse to bear arms but would have to pay for someone else to serve in their place. In other words, religious objectors would be permitted to opt out of military service, and shift their legal obligations to serve to third parties, but would be required to pay for a substitute.[2]

The debates in Pennsylvania, together with similar debates in other colonies, crystallized the meaning of religious freedom in the new nation, striking a balance that respected vital principles of religious liberty, while also protecting the rights of third parties and the interests of the government. "Americans were in general agreement that government could lawfully require citizens to perform some manner of military service, sometimes with allowance for alternative service or, more commonly, monetary payments. The doctrine of the Pennsylvania Bill of Rights of 1776 . . . had not only gained wide ac-

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[2] Debates on the issue continued until 1790, when Pennsylvanians rejected an effort to remove the constitutional requirement that conscientious objectors pay for a substitute. The 1790 Constitution included a broad protection for religious liberty, providing that "no human authority can, in any case whatever, controul or interfere with the rights of conscience," Pa. Const. of 1790, art. IX, § 3, while reaffirming that "[t]hose who conscientiously scruple to bear arms, shall not be compelled to do so; but shall pay an equivalent for personal service." *Id.* art. VI, § 2. The drafters of the Pennsylvania Constitution, both in 1776 and 1790, did not understand the requirement to pay for a substitute as inconsistent with freedom of conscience.

ceptance during the war years, but found a place in nearly every state constitution adopted in wartime." MacMaster et al., *supra*, at 531 (footnote omitted); *see also* Hamburger, *supra*, at 1603 (describing 1775 debates as "a revealing moment in the development of American religious liberty").

These Revolutionary-era debates on religious freedom would loom large when Americans debated the Constitution and proposals for a Bill of Rights.

B. The Framers of the Second Amendment Rejected an Unconditional Religious Exemption from Military Service.

Religious exemptions from military service remained an important issue at the time of the framing of the Constitution and the Bill of Rights. During the Founding-era debates over the Bill of Rights, a number of states insisted that the Constitution should include a religious accommodation for conscientious objectors to military service that would require religious adherents to pay to furnish a substitute, affirming the balance struck in the Pennsylvania Constitution of 1776 and other Revolutionary-era Constitutions. Three States—Virginia, North Carolina, and Rhode Island—urged ratification of an amendment that provided that "any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 335 (Jonathan Elliott ed., 1836) (Rhode Island); 3 *id.* at 659 (Virginia); 4 *id.* at 244 (North Carolina).

When the First Congress met in 1789, James Madison proposed including in the Bill of Rights a guarantee that "no person religiously scrupulous of bearing arms shall be compelled to render military

service in person." 1 Annals of Congress 451 (1789). Because the religious exemption was limited to "military service in person," Madison's amendment would have "allowed the government to condition an exemption on the paying of a fine or the hiring of a substitute." West, *supra*, at 396.

The "in person" limitation was understood by members of the House as critical to respecting the balance between the rights of religious adherents, third parties, and the government. Indeed, in August, 1789, the House rejected an attempt to eliminate this key limitation and broaden the scope of the religious exemption proposed by Madison.

On August 17, 1789, Rep. Elias Boudinot introduced an amended version of what would become the Second Amendment, which included a religious exemption providing that "no person religiously scrupulous shall be compelled to bear arms." 1 Annals of Congress 778 (1789). A number of members of the House were sharply critical of the new, broader religious exemption. Rep. James Jackson argued that an unconditional exemption was "unjust, unless the constitution secured an equivalent," and moved to amend the language to require payment of an equivalent. *Id.* at 779. Rep. William Smith agreed, laying stress on "the words used by the conventions respecting this amendment." *Id.* Smith argued that the language should "conform to what was proposed by Virginia and Carolina," which provided that religious objectors "were to be excused provided they found a substitute." *Id.* Rep. Egbert Benson went even farther, urging that the entire exemption did not belong in the Constitution. Benson insisted that a religious exemption "is no natural right," *id.* at 780, and would thrust the courts into "every regulation you make with respect to the organization of the militia." *Id.*

Whether to provide a religious exemption, or to require a conscientious objector to find a substitute, were matters that "ought to be left to the[] [legislature's] discretion." *Id.*

During the debates, some members, such as Rep. Roger Sherman, defended the broader religious exemption, insisting that "those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent." *Id.* at 779. But Sherman's views did not carry the day. When the debate continued several days later, Rep. Thomas Scott renewed objections to the unconditional exemption. "[I]f this becomes part of the constitution, such persons can neither be called upon for their services, nor can an equivalent be demanded; it is also attended with still further difficulties, for a militia can never be depended on." *Id.* at 796. The House then voted to add the "in person" limitation back into the proposed amendment. *Id.*; *see also* Laycock, *supra*, at 1810 (explaining that "opponents who wanted a more limited exemption, requiring payment of a fee or provision of a substitute. . . . prevailed in the House, by the addition of the words 'in person'").

Ultimately, the Senate removed the religious exemption entirely and the Second Amendment was ratified without making any provision for conscientious objectors. Congress would soon, however, return to the issue in debating the nation's first federal militia law.

C. The First Militia Act Did Not Require an Unconditional Religious Exemption From Military Service.

In 1790, the First Congress turned to the task of providing for a national militia. Quakers petitioned Congress for an exemption "from militia duties and

penalties on that account," 2 Annals of Congress 1859 (1790), and received support in Congress from Rep. Aedanus Burke, who argued that it "was contrary to the Constitution" to "make a respectable class of citizens pay for a right to a free exercise of their religious principles." *Id.* at 1865. But these views, once again, failed to muster majority support.

During the debates over the Act, Rep. James Jackson argued that an unconditional religious exemption that "requir[ed] no compensation from the exempted" would "lay the axe to the root of the militia," *id.*, and "make the whole community turn Quakers; and in this way it would establish the religion of that denomination more effectually than any positive law could . . . ." *Id.* at 1869. Jackson insisted that "[t]hose who are exempted ought to pay a full equivalent on every principle of justice and equity." *Id.* at 1870. Rep. Williams Giles agreed, asserting that "every man who receives the protection of the laws ought to contribute his proportion to the support of the laws." *Id.* at 1872-73. While Rep. James Madison was initially supportive of a complete exemption, he joined with others in supporting a requirement that religious objectors pay to furnish an equivalent. *Id.* at 1873-74. The members of the First Congress did not view the requirement to pay an equivalent as a substantial burden on religious exercise.

Ultimately, when Congress enacted the First Militia Act in 1792, it refused to establish any religious exemption of any kind, instead providing that "all persons who now are or may be hereafter exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty . . . ." Act of May 8, 1792, ch. 33, § 2, 1 Stat. 271, 272. The upshot of Congress's decision to incorporate whatever exemptions were provided by state law was that, in many

states, conscientious objectors had to pay in order to furnish an equivalent. Indeed, in the 18th and early 19th centuries, numerous States had written the principle that conscientious objectors had to provide an equivalent into their State Constitutions, continuing the trend started by the Pennsylvania Constitution of 1776. *See, e.g.*, Ala. Const. of 1819, art. IV, Militia, § 2 ("Any person who conscientiously scruples to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service."); Ill. Const. of 1818, art. V, § 2 ("No person or persons conscientiously scrupulous of bearing arms shall be compelled to do militia duty in time of peace, provided such person or persons shall pay an equivalent for such exemption."); Ind. Const. of 1816, art. VII, § 2 ("No person or persons conscientiously scrupulous of bearing arms, shall be compelled to do Militia duty; provided such person or persons shall pay an equivalent for such exemption."); Iowa Const. of 1846, art. VII, § 2 ("No person or persons conscientiously scrupulous of bearing arms, shall be compelled to do militia duty in time of peace; provided that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens."); Ky. Const. of 1792, art. VI, § 2 ("Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service."); Miss. Const. of 1817, art. IV, Militia, § 3 ("Those persons who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay equivalent for personal service."); Mo. Const. of 1820, art. XIII, § 18 ("That no person who is religiously scrupulous of bearing arms, can be compelled to do so, but may be compelled to pay an equivalent for military service, in such manner as shall be prescribed by law.").

Thus, from the Founding to the Civil War, state militia laws very frequently required conscientious objectors to pay an equivalent to meet the essential needs of the government.

II. FEDERAL DRAFT LAWS FROM THE CIVIL WAR UNTIL TODAY HAVE REQUIRED A RELIGIOUS OBJECTOR TO PERFORM ALTERNATIVE SERVICE.

The Civil War continued the trend of accommodating religious adherents who were conscientiously opposed to combat, while also insisting that individuals of all religious persuasions serve the nation. During the Civil War, the nation's first federal draft laws freed religious objectors from military service, while requiring that they perform some form of alternative service or pay a sum of money to aid the nation. By striking this balance, Congress protected religious liberty, the rights of third parties, and the important interests of the government.

At the beginning of the war, the Union had relied exclusively on state militias and volunteers, but that proved inadequate to the defense of the nation. Recognizing that "a military force is indispensable, to raise and support which all persons ought willingly to contribute," the Conscription Act of 1863 broadly required men between the ages of 25-45 "to perform military duty in the service of the United States when called out by the President for that purpose." Act of Mar. 3, 1863, ch. 75, 12 Stat. 731, 731. The Act did not exempt conscientious objectors, but provided that "any person drafted . . . may . . . furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, . . . for the procuration of such substitute . . . ." *Id.* § 13, 12 Stat. at 733. In this re-

spect, the 1863 Act was similar to longstanding state laws that required conscientious objectors to pay to furnish an equivalent. *See* James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 603 (1988) (observing that "[s]ubstitution was hallowed by tradition, having existed in European countries . . ., in American states during the Revolution, in the militia, and in the Confederacy").

In 1864, Congress revisited the question of religious accommodation for conscientious objectors. While retaining that part of the Conscription Act of 1863 that allowed an individual subject to the draft to procure a substitute, the 38th Congress enacted a federal accommodation for individuals whose religion prohibited them from engaging in combat. The 1864 Act provided that "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations . . . shall . . . be considered noncombatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars . . . to be applied to the benefit of the sick and wounded soldiers." Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9.

Notably, the Act did not exempt conscientious objectors entirely from the war effort, even though their participation could be thought to have the "effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. Rather, the 1864 Act struck a balance, furthering religious liberty by exempting conscientious objectors from having to serve in combat, while still requiring them to serve the nation and aid the war effort. As

the Act's proponents insisted, the requirement of alternative service "relieves [conscientious objectors] and does not injure or weaken the Government in any respect." Cong. Globe, 38th Cong., 1st Sess. 206 (1864). Crucial to this balance was the requirement that conscientious objectors to war perform some kind of alternative service to meet the needs of the nation. *See id.* ("[W]e . . . provide that they shall render service in the hospitals or pay money to be used for our sick and wounded soldiers. We need their money for that purpose, more than we can get, and we need all their personal service for that purpose."). Religious adherents, who considered war sinful, could not refuse to participate in the war effort entirely—they still had to perform alternative service to the nation or pay to aid sick and wounded soldiers.

The requirement of alternative service embodied in the 1864 Act has, in one form or another, been a critical aspect of federal laws governing military service ever since. Federal laws in force during World War I, World War II, and since have required those with a religious objection to war to work in noncombat positions or, more recently, in civilian work to aid the nation. *See* Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 78 (providing an exemption to individuals "whose religious convictions are against war or participation therein," while maintaining that "no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant"); Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 885, 889 (exempting from "combatant training and service" any person who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form" but requiring that "[a]ny such person claiming such exemption . . . shall . . . be assigned to noncombatant service . . ., or shall,

if he is found to be conscientiously opposed to participation in such noncombatant service, . . . be assigned to work of national importance under civilian direction").

Current federal military law, applicable in the case of a future draft, exempts "any person" who, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form" from "combatant training and service," requiring such persons to perform "noncombatant service" or "civilian work contributing to the maintenance of the national health, safety, or interest." 50 U.S.C. § 3806(j).

In order to obtain this exemption from combat training, a conscientious objector must register with the Selective Service, complete an application, and submit to an interview by a chaplain concerning his or religious views. *See generally* Dep't of Defense Directive 1300.6 (May 31, 2007). The government will then conduct an investigation into the claim. If the exemption is granted, the individual must perform two years of government service—either noncombatant or civilian work—and another individual will perform military service in his place. *See, e.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 96 n.13 (1977) (Marshall, J., dissenting) ("the effect of excusing conscientious objectors from military conscription is to require a nonobjector to serve instead, yet we have repeatedly upheld this exemption"); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 455 (7th Cir. 1981) ("[W]hen an individual is exempted from military service as a conscientious objector, another individual must go in his place."); *Sheridan v. United States*, 483 F.2d 169, 174 (8th Cir. 1973) ("When he refused to be inducted, another person had to be called in his place.").

Quite plainly, even the modern conscientious objector scheme, which requires an in-person interview and subsequent investigation, "is administratively more burdensome than filing the Form or notifying HHS to opt out of the Mandate." *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1184 n.33 (10th Cir. 2015); *see also Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring) (observing that the "process for claiming conscientious objector status is far more demanding than the accommodation to which Notre Dame objects"), *cert. filed*, No. 15-812 (U.S. Dec. 18, 2015).

III. PETITIONERS' INTERPRETATION OF RFRA WOULD WREAK HAVOC WITH LAWS THAT ALLOW CONSCIENTIOUS OBJECTORS TO OPT OUT OF MILITARY SERVICE AND REQUIRE OTHER PERSONS TO SERVE IN THEIR PLACE.

Petitioners in these cases claim that the religious accommodation contained in the Affordable Care Act's regulations imposes a substantial and unjustified burden on their right to the free exercise of religion, insisting that the requirement that they fill out a form or notify HHS that they qualify for the accommodation somehow makes them complicit in the provision of contraceptive coverage. Petitioners' sweeping interpretation of RFRA would subject all manner of conscientious objector laws to strict scrutiny. Given petitioners' insistence on the extremely high bar the government must clear to satisfy strict scrutiny, it is far from clear how many would survive.

Indeed, based on petitioners' view of RFRA, a conscientious objector could significantly hinder any military draft, insisting that "if his exemption means someone else must substitute for him to engage in

wrongdoing, he will be morally responsible for it and his religious exercise will be substantially burdened." *Univ. of Notre Dame*, 786 F.3d at 623 (Hamilton, J., concurring); *see also* Resp't's Br. at 48. That view, of course, has never been the law. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437, 461 (1971) ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."); *Robison*, 415 U.S. at 385 (upholding the denial of educational benefits to conscientious objectors because "[t]he withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if indeed, any burden exists at all"). As the history of conscientious objector laws show, "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *United States v. Lee*, 455 U.S. 252, 261 (1982).

No one doubts that avoiding moral complicity is an important part of the guarantee of free exercise of religion. As history shows, since the birth of our nation, state and federal governments have enacted laws designed to relieve conscientious objectors to war of the responsibility to fight in wars they view as sinful, transferring the obligation to serve to other persons. But the free exercise right has never been understood to invalidate the efforts of government to relieve religious adherents of a legal duty and transfer that duty to third persons.

On the contrary, religious accommodations enacted to spare conscientious objectors of combat duty have not only allowed others to fulfil that duty, but many have gone even further, requiring religious adherents to find the individuals to fulfill that duty. Most significantly, early in this nation's history, con-

scientious objector laws often required those opposed to combat to pay to procure a substitute. Since the Civil War, federal laws have required those opposed to war to perform alternative service to aid the nation, even those who believe that assistance to the nation will further the war effort they view as sinful. What petitioners demand here—an unconditional religious exemption that would prevent others from fulfilling their legal obligation and thereby significantly harm third parties—has been repeatedly rejected over the course of our nation's history.

* * *

When government acts to accommodate religion by allowing religious objectors to opt out of their legal duties and allow those obligations to be performed by third parties—as it has done for more than two hundred years in the context of military service—it respects the guarantee of the free exercise of religion, while protecting the rights of third parties and the interests of the government. Carefully tailored religious accommodations—like those contained in the Affordable Care Act's implementing regulations—ensure that "[a]ll . . . should have a free use of their religion, but so as not on that score to burden or oppress others." *See* Rev. Francis Alison, *supra*. Like conscientious objector laws that have been enacted over the entire course of American history, the accommodation challenged here "achieves all of the Government's aims while providing greater respect for religious liberty," *Hobby Lobby*, 134 S. Ct. at 2759. The accommodation should be upheld.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgments of the courts of appeals.

Respectfully submitted,

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